DERIVATIVE ACQUISITION OF OWNERSHIP

PART 2 – DELIVERY

Introduction

We have already established that ownership of a moveable generally passes on delivery accompanied by an intention to pass ownership. This is the "real agreement", which is entirely conceptually separable from the underlying contract or legal cause for which ownership is passed.

In this lecture, we will run through the various recognised forms of delivery, together with the prescribed cases dealing with them.

Actual Delivery

At the common sense heart of the idea of delivery is the physical handing over of the item. Actual delivery can take place through the transferee's agent or representative, or by placing the person in control of a thing by leaving it at their premises (a widely used example is the driving of cattle into a person's kraal). It is fairly obvious when actual delivery has taken place, and very little controversy is caused by this kind of delivery.

Constructive (or fictitious) Delivery

There are, however, a number of other forms of delivery, which do not involve actually handing property over to the transferee. These are the various forms of constructive delivery. Constructive delivery takes place where-

1. the transferor hands over an instrument by which the transferee may exercise physical control of a thing which cannot, itself, be physically handed over, with

the intention to make him or her owner of it (*clavium traditio*). Examples include handing over keys to a barn where grain is stored, the handing over a of bill of lading and delivering the keys to a car.

2. the transferor points out the thing to the transferee, with the intention to pass ownership, in circumstances where the transferee will be able to exercise physical control over a thing (long hand delivery or *traditio longa manu*). Examples include pointing out a pile of bricks, a machine, etc.

3. the transferor remains in control of a thing for a valid legal reason, but the parties intend for the transferee to become owner of it, even though it remains with the transferor (*constitutum possessorium*);

4. where the transferee is already in control of the thing, and there is simply a change in intention as to ownership (*traditio brevi manu* or short hand delivery)

5. where neither the transferor nor the transferee are in possession of the thing (Attornment).

Each of these forms of delivery is best illustrated by exploring the prescribed cases. In each of the cases below, try to work out which form of delivery is being dealt with. We will discuss the answers in class.

Lenalease Finance v Corporation De Mercado Agricola

In this matter, the South African Maize Board sold a large quantity of grain to the Venezuelan government. The Venezulelan government was represented by the

Corporation De Mercado Agricola ("CMA"). CMA needed to contract someone to ship the grain from South Africa to Venezuela. It contracted a firm called Raphealy to do so. CMA and Raphealy concluded a contract to ship the maize, but, ultimately CMA was dissatisfied with its terms and sought to resile from it. Raphealy took the view that CMA had repudiated the contract and claimed contractual damages from it, but then ceded its claim to Lenalease, which sought to enforce the claim.

In the meantime, CMA had made other arrangements to ship some of the grain from Cape Town harbour. A consignment of grain had already been loaded onto a ship. Upon hearing of this, Lendalease brought an urgent application to attach the grain to found jurisdiction to sue CMA. The effectiveness of the attachment depended on CMA actually having ownership of the grain. If CMA did not own the grain, the attachment would be unsuccessful.

Both the High Court and the Appellate Division decided that CMA did not own the grain, and that ownership of the grain still vested in the Maize Board. The Appellate Division based its conclusion on the fact that ownership of the grain depended on the interpretation of clause 11 of the contract between CMA and the maize board. The Appellate Division decided that clause 11 of the contract meant that ownership of the maize would not pass until the purchase price was paid and CMA was placed in possession of the maize.

Possession of the maize was, in law, symbolised by the handing over and endorsement of what is known in maritime mercantile law as a "bill of lading". The bill of lading is a document which identifies the consignment, and contains details of responsibility for the costs of shipment and the insurance policies under which the consignment is shipped. Ownership of the consignment depends on the handing

over of the bill of lading (since the consignment cannot itself be physically handed over). The person in whose favour the bill of lading is endorsed controls the consignment.

The Appellate Division interpreted the contract between CMA and the Maize Board to mean that ownership of the consignment would pass when the bill of lading was endorsed in favour of CMA and handed over to CMA's bankers against payment for the consignment.

Because the bill of lading had not been handed over, the Appellate Division found that ownership of the maize did not yet vest in CMA, but still vested in the Maize Board.

Which form of delivery did the Appellate Division have in mind and why?

Groenewald v van der Merwe

In Groenewald v van der Merwe, a farmer called Du Toit sold some threshing machinery to a Mr. Groenewald. He signed a document declaring that ownership had passed to Groenewald. The machinery, however, was left in Du Toit's possession and for his use indefinitely. Eighteen months later, and in need of funds, Du Toit sold the machinery again to a Mr. van der Merwe. Again, van der Merwe left the machinery in Du Toit's possession. Shortly after the sale to van der Merwe, Groenewald took possession of the machinery.

Van der Merwe sued to recover the machinery, and the High Court ruled in his favour. Greonewald appealed. The Appellate Division dismissed the appeal. It did so because it found that the facts surrounding the sale to Groenewald did not support

the inference that ownership had passed, while the facts relating to the sale to van der Merwe did support such an inference.

It is recorded in the judgment that about a month after the sale to him, Groenewald went over to Du Toit's farm in order to obtain the machine. Du Toit asked Groenewald not to take the machine, because it needed repairs, and he still had use for it. Groenewald agreed to this and said that Du Toit may keep the machine and use it until Groenewald asked for it again.

When van der Merwe bought the machine, he went over to the farm to obtain possession. The evidence was that he and Du Toit walked around the machine and at the end of the discussion both declared the machine to be the property of van der Merwe. Thereafter van der Merwe wrote to Wessels (a man employed by Du Toit to operate the machine) and asked him to use the machine to thresh for him.

On what basis do you think the Appellate Division found for van der Merwe? What form of delivery did it find had taken place?

Info Plus v Scheelke and Another

In this matter Info Plus purchased a car from Wesbank under the terms of an instalment sale agreement. It was agreed that ownership would not pass until the final payment in terms of the agreement had taken place. Info Plus, being in possession of the vehicle, decided to sell the car on and gave it to a car dealer – "Sharmin" – in order to look for a purchaser for the car on Info Plus's behalf. An employee of Sharmin then sold the car on to another person – named in the law report only as "M" – without Info Plus's permission, for substantially less than it was worth, pocketed the proceeds of the sale and disappeared.

When Info Plus discovered what had happened, it asked Wesbank – as owner – to recover the car. Instead, Wesbank concluded an agreement with M, in terms of which M paid the balance owing on the instalment sale agreement to Wesbank, and Wesbank agreed not to attempt to repossess the car.

Info Plus then brought its own action to recover the car. The High Court decided against Info Plus on the basis that it was not in possession of the car at the time the purchase price was finally paid. For that reason, the High Court held, Info Plus never become "owner" of the car because it had not been properly delivered to Info Plus.

The Supreme Court of Appeal reversed the High Court's decision, finding that Info Plus became owner of the car when purchase price was paid in full – whether or not it was still in possession. The clear intention behind the agreement, the SCA found, was that Info Plus would possess and use the car before the purchase price was paid, while ownership remained vested in Wesbank. The fact that Info Plus had take possession and later given it up made no difference. The car had been delivered to Info Plus, which would become owner on payment of the full purchase price.

What form of delivery took place? When did it take place? How did it result in the passing of ownership to Info Plus?

Vasco Dry Cleaners v Twycross

In this matter a business known as Vasco Dry Cleaners was sold by a man called Basil Carides to a company known as Air Capricorn. Air Capricorn was controlled by a man called "Duff". The sale agreement provided for payment of the purchase price in instalments. The agreement also provided that Carides would remain owner of the company until the final instalment of the purchase price was paid. Soon after

purchasing the company, Duff (and Air Capricorn) ran into financial difficulties. Duff concluded an agreement with his brother-in-law, Twycross. In terms of the agreement, Duff would sell certain dry cleaning machines to Twycross for roughly the same amount of money as the outstanding purchase price for Vasco Dry Cleaners (some R4700). However, the machines remained on Vasco Dry Cleaners' premises for its use. The agreement further stipulated that Vasco Dry Cleaners would then re-purchase the machines at a later stage. If it did not, Twycross would be entitled to take ownership of them.

Duff then paid Carides the outstanding balance owing on Vasco Dry Cleaners. Soon thereafter, he sold Vasco Dry Cleaners to a man called Butcher, warranting that the machines were in fact the property of Vasco Dry Cleaners – and then promptly disappeared, without repurchasing the machines from Twycross.

Twycross then brought an action to recover the machines as owner. Vasco Dry Cleaners (nor controlled by Butcher) opposed the application. The High Court ruled in Twycross's favour. Vasco Dry Cleaners appealed.

The Appellate Division held that, whether Twycross was in fact the owner of the machinery depended on whether the agreement to sell and resell the machines was genuinely a sale agreement, or another kind of agreement disguised as a sale agreement. A related question was whether the machines had ever been delivered to Twycross. The Appellate Division held that, where the seller of property remains in possession of a thing, but it is claimed that ownership had changed, the form of delivery involved requires careful scrutiny. This is because there is no outward manifestation of delivery. "Delivery" is merely a change in mental attitude to the property. A court must carefully consider whether the intentions of both seller and

purchaser are to effect a real agreement (i.e. to transfer ownership), or whether some other purpose is in mind.

In this case the Appellate Division decided that there was no real intention to pass ownership. What was instead intended was for Twycross to hold the machines as security for a debt (the R4700 he paid to Duff). Accordingly, Twycross never became owner of the machines, because delivery never took place.

What form of delivery was involved in this case and why?

Caledon v Wentzel

In this case A and B concluded an agreement in terms of which B would sell vehicles on credit to third parties and then cede the credit agreements and ownership of the cars to A. B sold a vehicle to C on credit and transferred physical control to C. B then ceded the credit agreement to A, as well as transferring ownership of the vehicle to A. A then informed C that he was the owner of the vehicle, but, by that time C had sold the vehicle on to D, and D to E. The question in this case was whether A actually had become the owner of the vehicle, or whether ownership vested in E.

That question, in turn, depended on whether A had ever taken delivery of the vehicle. The Appellate Division decided that A had taken delivery of the vehicle at the point the credit agreement was ceded to A. At that time, C was still in possession of the vehicle. It did not matter that, by the time A informed C that A was the owner of the vehicle, C had sold the vehicle on.

What sort of delivery was made to A, when and why? Is the Appellate Division's decision convincing?